

This is the second proceeding for post-award medical care that has been filed in this claim. This claim, which is for a January 2006 accident and resulting low back injury, was

settled on March 7, 2007, based upon a 14 percent whole person functional impairment. Under the terms of the settlement, claimant reserved the right to seek additional medical treatment.

In the first proceeding for post-award medical treatment, former Administrative Law Judge Robert H. Foerschler granted claimant's request for additional medical care. The Board affirmed that decision in its June 30, 2008, Order. But while the first proceeding was pending before Judge Foerschler, claimant experienced an incident in March 2008 in which he was unable to straighten up after reaching into his refrigerator. Claimant then filed this second proceeding for post-award medical benefits.

In the April 17, 2009, Post-Award Medical Award, Judge Yates Roberts granted claimant's request for additional medical care and approved medical treatment at respondent's expense with Dr. Adrian Jackson. At page 3 of that Award, the Judge summarized her reasoning, as follows:

It is undisputed that prior to the March 17, 2008 incident, an annulus tear was documented by MRI at the level of L3-L4. This minor activity of reaching into a refrigerator does not constitute an intervening accident but rather represents a natural consequence of the original injury of January 2006. Claimant has never had a resolution of his pain since the original injury and was previously awarded additional medical treatment by the administrative law judge that was affirmed by the Appeals Board. That treatment has never been provided.

Respondent contends Judge Yates Roberts erred and the Board should reverse the April 17, 2009, order. Respondent maintains claimant sustained a new and distinct accident on March 17, 2008, and, therefore, the L3-4 herniated disc that has been diagnosed is not related to his January 2006 accident at work. In addition, respondent argues the problems at that level of the lumbar spine are new and distinct as claimant initially injured and received medical treatment for his L4-5 and L5-S1 discs. In the alternative, respondent contends claimant's present problems at L3-4 are merely the progression of degenerative changes at that level, which it asserts is unrelated to his January 2006 accident. Consequently, respondent acknowledges that it is responsible for treating claimant's low back at the L4-5 and L5-S1 intervertebral levels but denies it is responsible for treating L3-4.

Claimant, however, requests the Board to affirm the April 17, 2009, order. Claimant argues that despite undergoing back surgery in May 2006 his back symptoms have not changed. Consequently, claimant maintains the May 2006 surgery at L4-5 and L5-S1 was either unsuccessful or it was performed at the wrong level. Claimant's argument is summarized, as follows:

Dr. Jackson's suggestion that surgery is now necessary at L3-L4 is suspicious. If claimant's complaints are the same now as they have been since January 2006, then how does he explain the absence of relief from his first surgery? How does Dr. Jackson now say he would only operate at L3-L4 since his first surgery at the two lower levels for the same symptoms was unsuccessful? Either the first surgeries at L4-L5 and L5-S1 were not successful because they were the wrong location or L3-L4 should have been operated also. The symptoms are the same. The question is whether Dr. Jackson knows at what level to operate. We know past efforts have not met with success.

Claimant respectfully suggests that his symptoms have never changed from 2006 and the current need for treatment and temporary total benefits are the natural and probable consequence of his initial injuries in 2006 and should be the responsibility of the respondent and insurance carrier.¹

The issue before the Board on this appeal is whether claimant's present need for medical treatment is related to his January 2006 accident or, instead, whether claimant has sustained an intervening injury that is unrelated to his accident at work.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, the Board finds:

The Board incorporates the findings it made in its June 30, 2008, Order. In short, the parties stipulated claimant injured his low back in January 2006 when he slipped and fell while working for respondent as a propane truck driver. Approximately 16 years before, claimant underwent low back surgery at the L4-5 and L5-S1 intervertebral levels.

In April 2006, Dr. Adrian P. Jackson began treating claimant. The doctor believed claimant's January 2006 work-related accident caused a recurrent herniated disc at the L4-5 level. In May 2006, Dr. Jackson performed a revision discectomy at L4-5 and revision laminectomies at both L4-5 and L5-S1. The doctor treated claimant through July 26, 2006, when the doctor released claimant from medical treatment without any work restrictions. The doctor, however, acknowledged that when released claimant was continuing to experience low back pain.

In September 2006, orthopedic surgeon Dr. Edward J. Prostin examined claimant. Claimant reported that he had almost constant pain across his low back and frequent pain, numbness, and tingling into his left leg and foot. Claimant also reported that his symptoms

¹ Claimant's Brief at 14, 15 (filed May 14, 2009).

worsened with bending, standing, and squatting and that he was reluctant to do significant pushing, pulling, or lifting. The doctor recommended physical therapy and medications.

In June 2007, claimant returned to Dr. Jackson because of ongoing low back and left lower extremity symptoms, which claimant maintained had progressively worsened since his May 2006 surgery. The doctor concluded claimant's complaints were more consistent with S1 radiculopathy. In his July 30, 2007, notes, Dr. Jackson wrote:

Mr. Earnest returns after his MRI with and without contrast of the lumbar spine. In summary, Mr. Earnest underwent a revision discectomy at L4-5 approximately 15 months ago. He did have dramatic relief of his bilateral lower extremity symptoms and became much more functional following the revision decompression. He did, however, have some residual left lower extremity pain that did not go away following the surgery. This pain has been quite persistent and radiates down the buttock region posterior thigh, posterior calf and into his left heel. Mr. Earnest is a stoic individual, who has tolerated the symptoms for greater than a year prior to requesting re-evaluation.²

Following the 2007 evaluation, Dr. Jackson concluded claimant had aggravated his underlying low back condition at L5-S1. The doctor then recommended a nerve root block to help make a definitive diagnosis.

Claimant saw Dr. Prostin for another evaluation in September 2007. Claimant complained of increased pain in his left hip that radiated down into his foot. Dr. Prostin found significant hypertrophy of the L5-S1 facet on the left that had caused lateral recess stenosis. Moreover, the doctor concluded claimant's symptoms and low back problem were a natural progression of the January 2006 injury.³ The doctor testified, in part:

It's my opinion that every day that he gets older, his degeneration progresses a little bit more and that he becomes anatomically a little bit different and has some propensity to getting symptoms from those anatomic problems. It is hard to know whether it's the truck driving that causes the permanent worsening versus the natural progression of the degenerative condition.⁴

Based upon the fact that he did have S1 radicular symptoms in '06 and that undoubtedly the hypertrophic facet at L5-S1 was hypertrophic in '06, it seems to me

² Jackson Depo. (Feb. 22, 2008), Ex. 2.

³ Prostin Depo. (Jan. 8, 2008) at 14.

⁴ *Id.* at 21, 22.

to be the natural progression of the disease from '06 rather than a distinct new injury.⁵

Assuming the patient's statements to me were true, that he suffered no additional injuries since the previous examination by me, then it is my opinion that more probably than not, his current condition is predominantly caused by the natural progression of his disease that was caused or aggravated by the 2006 accident.⁶

When respondent did not accept claimant back to work following his surgery, claimant purchased a truck and in August 2006 began hauling cattle, grain, and hay. He discontinued that work as a self-employed cattle truck driver in either November or December 2007 due to worsening symptoms. But claimant denies sustaining any accidents from that work. Indeed, because he had been warned that falling down or being jarred might paralyze him, claimant testified he was very careful not to re-injure himself.

In the first proceeding for post-award medical treatment, the Board concluded in its June 30, 2008, Order that claimant was continuing to experience symptoms in his low back, left hip, and left leg despite his May 2006 surgery and that those ongoing symptoms were related to his January 2006 accident. Moreover, the Board found claimant's symptoms had gradually worsened over time and that the evidence did not establish that claimant had injured his back as a self-employed truck driver. The Board held in pertinent part:

Claimant's testimony is credible that his symptoms gradually worsened to the point he sought additional medical treatment and later to the point he could no longer work. Claimant's testimony is also credible that he was very careful in his work activities and had others assist him when necessary. In short, claimant's May 2006 surgery did not resolve the symptoms in his low back, left hip, and left leg, which have gradually worsened over time. And the evidence fails to establish that claimant sustained an intervening accident that would relieve respondent from its liability in this claim.⁷

Consequently, the Board affirmed the order granting claimant additional medical treatment in the first post-award proceeding.

In the meantime, while the first proceeding for post-award medical benefits was pending, claimant had an incident at home in mid-March 2008 when he could not

⁵ *Id.* at 22.

⁶ *Id.* at 25, 26.

⁷ *Earnest v. Miami County Co-op*, No. 1,028,595, 2008 WL 2673183 (Kan. WCAB June 30, 2008).

straighten his back due to low back and left hip pain after reaching into his refrigerator to get some hamburger. At his January 2009 hearing, claimant testified that he has not been pain-free and has had numbness to some extent in both his left hip and left leg since his January 2006 accident. He specifically testified that the May 2006 surgery performed by Dr. Jackson did not alleviate the problems in his back, left hip, and left leg.⁸ The surgery, however, did help alleviate symptoms in claimant's right leg. Claimant also testified that his symptoms that he told Dr. Prostic about in 2006 never resolved. In short, although an MRI now shows claimant has a herniated disc at L3-4, claimant believes his present problems are not any different, other than their severity, than when he testified in January 2008 in his first proceeding for additional medical benefits.

Since his March 2008 hospital stay, claimant has not received any additional treatment. And because Dr. Jackson has diagnosed a large extruded herniated disc at L3-4, claimant has not received any of the medical treatment contemplated in the first proceeding for additional medical treatment.

In approximately May 2008 claimant resumed driving his truck when he was told he would go back to jail if he did not work. Claimant testified, in part:

Q. (Mr. King) Sir, have you worked at all since December of '07?

A. (Claimant) Well, Mr. King, you people have left me no other choice but to work. I was arrested for back child support because I couldn't work and the judge told me that if I didn't go back to work it was to go back to jail. So I've had no other choice, Mr. King, but to go back to work. You people have given me no other choice.⁹

Both Drs. Jackson and Prostic testified in this proceeding for additional medical benefits. Dr. Jackson testified that an MRI from 2006 showed a broad-based bulge and annular tear at the L3-4 disc, which is now herniated. According to Dr. Jackson, who last saw claimant in March 2008 at the Shawnee Mission Medical Center, claimant's symptoms in 2006 were not consistent with an injury of the L3-4 disc. Moreover, the doctor indicated the MRI of the L3-4 level in 2006 was consistent with "run-of-the-mill" degenerative changes from the natural aging process.¹⁰ But the March 2008 MRI shows claimant now has a large extruded herniated disc at L3-4.

⁸ P.A.H. Trans. (Jan. 29, 2009) at 14.

⁹ *Id.* at 18.

¹⁰ Jackson Depo. (Feb. 24, 2009) at 6, 9.

Dr. Jackson also indicated that in June 2007 claimant's symptoms were consistent with an S1 radiculopathy and there were no findings or symptoms indicative of problems at the L3-4 level. The doctor believes claimant herniated the L3-4 disc in March 2008 reaching into the refrigerator.¹¹ Moreover, Dr. Jackson feels claimant's present problems are predominantly caused by the herniated L3-4 disc. The doctor explained:

Q. (Mr. Horner) I understand what you're saying, we're not sure whether the problem is at S1, where you initially suspected, or whether there's a problem at L3-4 above which is compromising that same area?

A. (Dr. Jackson) Let me clarify that. I do believe that he probably still has some degree of compromise at the L-5, S-1 level causing that S1 radiculopathy. I saw him prior to this blow out, he had at L3-4 and he was complaining of S1 symptoms, which is more likely coming from that L5-S1 level. He now has another issue, which is a far bigger issue, where you can't address the entire thing, you want to go after what's causing the predominance of his symptoms to give him the best chance of getting better. He's not going to be perfect no matter what you do.¹²

And although claimant had an annular tear¹³ in his L3-4 disc in 2006, the doctor did not believe that tear was necessarily consistent with claimant's slip and fall accident in 2006 or that an annular tear would necessarily further worsen with activity. Moreover, Dr. Jackson testified that he did not believe an annular tear would predispose an individual to a further worsening of their condition with activity. Moreover, the doctor refuted with claimant's theory that the herniated L3-4 disc was related to an annular tear discovered at that level in 2006. The doctor testified, in part:

Q. (Mr. Horner) Okay. You agree with me, though, that all the findings were present after the January 2006 injury and the resulting MRI; correct?

A. (Dr. Jackson) Which findings?

Q. The MRI findings at L3-4.

A. The MRI findings currently at L3-4 are completely different than the MRI findings of 2006.

¹¹ *Id.* at 9.

¹² *Id.* at 30.

¹³ The 2006 MRI showed a high intensity zone, which has been assumed to be an annular tear.

Q. Because at this point in time the annular tear has allowed the disc to come out; correct?

A. No. You keep going back to the annular tear, and I'm not going to fall into that. I apologize, but I'm just -- with all due respect, he has an extruded disc herniation at L3-4. Annular tears are irrelevant.

Q. Okay.

A. You can herniate a disc with or without an annular tear. An annular tear can be completely asymptomatic.¹⁴

Moreover, Dr. Jackson, who is a board-certified orthopedic surgeon, does not believe the L3-4 disc was injured in claimant's January 2006 accident and cannot relate the L3-4 herniated disc to claimant's 2006 accident.

Dr. Jackson believes the L3-4 herniated disc has changed claimant's course of treatment. Rather than merely dealing with symptoms consistent with compression of the S1 nerve root, the doctor now envisions either a discectomy at L3-4 or, perhaps, a three-level revision decompression, which would be determined by further discussions with claimant. The doctor prefers to limit the trauma to claimant's back and, therefore, wishes to avoid the three-level revision decompression, if possible.

Dr. Prostic last evaluated claimant in September 2007 and, therefore, has not examined claimant since his March 2008 incident at home. But upon reviewing claimant's medical records, Dr. Prostic agrees that claimant now has a large extruded herniated disc at L3-4. Like Dr. Jackson, Dr. Prostic is a board-certified orthopedic surgeon. But unlike Dr. Jackson, Dr. Prostic believes claimant had an annular tear in his L3-4 disc and, therefore, the disc would have been predisposed to herniating from daily living activities.¹⁵ Moreover, the doctor initially testified he believes reaching into a refrigerator would be a daily living activity and, consequently, the additional pain claimant experienced from that incident in March 2008 was a natural progression of the injury claimant sustained in 2006.¹⁶ The doctor explained:

It's common for disk herniations not to occur all at once. It's actually uncommon for previously normal disks to herniate. Usually, there are breaches in the annulus that precede the protrusion of disk material. Bending over to get some

¹⁴ Jackson Depo. (Feb. 24, 2009) at 18.

¹⁵ Prostic Depo. (Oct. 14, 2008) at 4.

¹⁶ *Id.* at 6.

luncheon meat out of the refrigerator is probably less forceful than -- on the back than bending over to tie your shoelaces. It is an activity that should be done without injury to a disk.

So if there indeed was dynamic change in the L3-L4 disk from this incident, I would think that it occurred as a natural consequence of the previous disease noted with annular tear or bulge at that level.¹⁷

Dr. Prostic also testified that claimant's ongoing low back and left leg pain following the May 2006 surgery suggests "everything didn't get fixed during the surgery."¹⁸ The doctor acknowledges, however, that he has not examined claimant since 2007, does not know what claimant's present symptoms are, that claimant would have had significant degenerative changes in his low back before the 2006 accident, and that he (Dr. Prostic) could not answer with any certainty whether there has been a natural progression of claimant's degenerative disc disease. The doctor opined that if the L3-4 disc space was damaged in January 2006 the herniated disc was a natural progression of that injury. But the doctor admits he does not know if the L3-4 disc was damaged in 2006.¹⁹ Dr. Prostic testified, in part:

Q. (Mr. King) Whether that's a natural progression from his degenerative disk disease that's developed over the years or not is a question you can't answer; is that true?

A. (Dr. Prostic) Not with certainty.

Q. And that was the reason for your answer to Mr. Horner's question that if there was damage from '06, it was a natural progression; but you don't know if that level was damaged in 2006, correct?

A. Correct.²⁰

The Board concludes the April 17, 2009, Post-Award Medical Award should be affirmed. The evidence establishes that claimant's symptoms in his low back and into his left leg have never resolved since his January 2006 accident. Claimant is adamant his

¹⁷ *Id.* at 6, 7.

¹⁸ *Id.* at 7.

¹⁹ *Id.* at 14.

²⁰ *Id.*

present symptoms are similar to those he has experienced since his accident and even since his May 2006 surgery. That testimony is credible.

The Board further finds that the evidence fails to establish that claimant sustained an intervening accident in mid-March 2008 while reaching into his refrigerator. Conversely, the Board concludes that incident was a natural progression of the injury he sustained to his low back in January 2006.

In short, the Board finds the medical care presently proposed is to cure and relieve the effects of claimant's January 2006 accident and, therefore, should be provided by respondent.

WHEREFORE, the Board affirms the April 17, 2009, Post-Award Medical Award entered by Judge Yates Roberts.

IT IS SO ORDERED.

Dated this ____ day of July, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CONCURRING AND DISSENTING OPINION

The undersigned Board Member agrees with the majority that respondent and its insurance carrier are responsible for providing claimant with reasonable and necessary medical treatment for his work-related low back condition. However, I would find that this is limited to the L4-5 and L5-S1 levels. I disagree that claimant has proven his new L3-4 condition is causally related to his work with respondent. The testimony of the treating physician, Dr. Jackson, is more credible than that of Dr. Prostic in this regard. Dr. Jackson testified that claimant's 2006 injuries did not predispose claimant to his subsequent L3-4

disc herniation and that there is no causal connection between claimant's January 2006 accident and his current problem at the L3-4 level. Accordingly, I would deny claimant benefits for the L3-4 herniated disc.

BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
Jeffrey E. King, Attorney for Respondent and its Insurance Carrier
Marcia L. Yates Roberts, Administrative Law Judge